No. 92 - 1666

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID L. BUSH,

Petitioner,

vs.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ROBERT W. GILLIARD, NORMAN G. COX, JUDY A. McCAIN, CHARLES S. BELK, HOWARD F. MATHIS, III AND BILLY D. SALTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Robert C. Campbell, III
William E. Pipkin, Jr.
SINTZ, CAMPBELL, DUKE & TAYLOR
3763 Professional Parkway
Mobile, AL 36609
(205) 344-7241
Facsimile (205) 344-7400

Attorneys for Respondents

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STATEMENT OF THE CASE

1. PROCEEDINGS BELOW.

Respondents adopt the petitioner's "Statement Of The Case" as stated on pages 3 through 4 in petitioner's Petition for Writ of Certiorari and incorporate same into Respondent's Brief in Opposition.

2. STATEMENT OF THE FACTS

Petitioner, David L. Bush's Statement of the Facts fails to mention several important facts and contains facts which are irrelevant or unsupported and are contrary to the Federal District Court's Findings of Fact.

In November of 1987, petitioner filed a complaint with the U. S. Department of Education in Atlanta, Georgia, claiming that he was the victim of discrimination and retaliation by school officials. (B.3). In his complaint, petitioner made specific reference to and accusations against Paul Sousa, a school official. During a telephone conversation with the Department of Education, on or about February 19, 1988, petitioner was informed that no violations had been found with regard to his complaint. (B.4). During the aforementioned telephone conversation of February 19, 1988, petitioner again made accusations against Paul Sousa and specifically threatened "to hurt someone" and "take action himself." (B.4).

During February and early March of 1988, school officials received information from government agencies regarding petitioner's threats, and were advised to take action to prevent petitioner from harming school officials and students. (B.6). Based upon the reports and information received, school officials were concerned that petitioner posed a potential danger to students and school officials. (B.6). On or about February 8, 1988, school officials initiated an investigation as a result of their concerns that petitioner might harm students or school officials, the results of which were contained in a report. (B.9-10). School officials met with the Mobile County District Attorney's office to discuss their concerns regarding petitioner and possible options in handling what they felt was a dangerous situation. (B.10-11).

Robert Ensley ("Ensley"), a crisis specialist with the United States Department of Justice in Atlanta, Georgia, who had extensive contact with petitioner during the time period relevant to the present action, was concerned by petitioner's

apparent mental instability, his groundless allegations against the school system and his threats against the life of a school official. (B.6-9). Attempts to get help and support for petitioner or to talk with him about the situation were unsuccessful. (B.7). During his conversations with Ensley, petitioner threatened to kill Paul Sousa. (B.9). Ensley contacted and met with school officials on several occasions and discussed with them his knowledge of petitioner's threats and his concerns for the safety of the students and school officials. (B.7-8).

On or about March 2, 1988, the U. S. Department of Education contacted the Community Relations Division of the U. S. Department of Justice regarding petitioner. (R.56-Exhibit H). On or about March 3, 1988, petitioner placed a telephone call to the Department of Education during which he threatened to "get a gun and blow some brains out." (B.5). On or about March 3, 1988, the Department of Education informed school officials, via telephone, of petitioner's threats. (B.6).

On March 4, 1988, Salter, acting in his capacity as Superintendent of the Mobile County Public Schools, executed a Petition to Commit which was filed in the Probate Court of Mobile County, Alabama, with Salter as Petitioner and petitioner Bush as the subject of the Petition. (B.11). On March 4, 1988, a Writ For Body was issued by the Probate Court of Mobile County, Alabama, for the arrest of petitioner Bush. (B.16). On March 7, 1988, petitioner Bush, pursuant to the Writ For Body, was arrested by the Mobile County Sheriff's Department at Murphy High School and taken before the Probate Judge (B.16). After reviewing the Petition to Commit, the Judge informed the petitioner that, based upon the Petition, he was being sent to the University of South Alabama Medical Center, where he was held until March 10, 1989, when a hearing was held in Probate Court. (B.16-17). The Probate Court dismissed the Petition to Commit without prejudice. (B.20).

Petitioner admits that his entire complaint is based upon the fact that the Petition to Commit was executed and admits that he knows of no other activity by the Respondents. (B.24). No other evidence has been presented in support of petitioner's claims. Petitioner conceded in his deposition that Respondent Salter did not intentionally or recklessly include false statements in the Petition to Commit. (R.56-85-88, 94-95).

The following are facts which are incorrectly stated in petitioner's Statement of the Facts:

Contrary to petitioner's contention on pages 11 and 24 of his brief, the Probate Judge did not indicate that probable cause for petitioner's arrest and confinement were lacking. (B.20-21). The Probate Judge told petitioner that he believed the petitioner needed to talk with his doctor and see a doctor on a regular basis. (B.21).

The self-serving denials contained on page 12 of petitioner's brief regarding his threats against school officials were directly addressed by the District Court, which found Petitioner's "insistence that all of the allegations contained in the Petition to Commit are completely false is directly and completely contrary to all of the information contained in the record herein, including the transcript of the commitment hearing and the depositions." (B.52-53).

Petitioner's assertion, on page 12 of his brief, that school officials did not consult with him before executing the Petition to Commit, is irrelevant to the issues before this Court. This point was also directly addressed by the District Court which found that, "prior to executing the Petition, Salter and others considered alternatives to filing a commitment petition. . . . but were cautioned that a direct confrontation might precipitate drastic, disastrous consequences." (B.13).

Petitioner's contention, on page 13 of his brief, that he suffered a heart attack is not only irrelevant to the issues

before this Court but is also contrary to the medical evidence.

On pages 24 through 25 of his brief, petitioner asserts as fact that no arrest warrants or criminal complaints resulted from meetings between school officials and law enforcement officials. Such has not been established as fact, either in the District Court's Pretrial Order or in any other Findings of Fact.

On pages 24 through 25 of his brief, petitioner asserts that law enforcement officials informed school officials that there was no probable cause for arresting the petitioner. This is pure speculation on the part of the petitioner and finds no support whatsoever in the record.

SUMMARY OF THE ARGUMENT

Petitioner is seeking a Writ of Certiorari from a summary judgment entered by the United States District Court for the Southern District of Alabama which was affirmed by the United States Court of Appeals for the Eleventh Circuit, claiming that there are genuine factual issues to be decided by a jury. The District Court's entry of summary judgment in favor of the respondents with regard to petitioner's fourth amendment claims and Its dismissal of petitioner's remaining claims for lack of jurisdiction was proper.

Petitioner's claim is based upon his allegation that Respondent Billy Salter should not have filed the Petition to Commit. Petitioner attempts to present this claim through three separate but equally insupportable arguments. Petitioner first argues that Respondent Salter knowingly and intentionally, or with reckless disregard, included materially false statements in the Petition to Commit, which false statements were necessary to the Probate Judge's decision to issue the Writ for Body. (Pet. Brief, pp. 16-17, 32-33). This argument is totally unsupported by facts, as established by the undisputed evidence and petitioner's own admissions. Petitioner fails to present any evidence creating a genuine

issue of material fact regarding Respondent Salter's knowledge at the time he executed the Petition to Commit.

Petitioner's second argument incorrectly attempts to impose a duty upon Respondent Salter to evaluate the evidence in the Petition to Commit, mistakenly contending that Salter should have known that, under §22-52-10 of the Code of Alabama (1975), the evidence in the Petition was not sufficient to have the petitioner involuntarily committed. (Pet. Brief, pp. 28-29, 32). This argument involves a clear question of law, as § 22-52-10 has no bearing whatsoever on Respondent Salter's filing of the Petition. The question of probable cause for petitioner's arrest was properly decided by the Probate Judge and is not an issue before this Court.

In his final argument, petitioner claims that the Board of School Commisioners of Mobile County is liable for the actions of Salter under the doctrine of respondeat superior. (Pet. Brief, pp. 29-31). This also involves a clear question of law, as the Board of School Commissioners of Mobile County may not be held liable under the doctrine of respondeat superior.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO EVIDENCE THAT RESPONDENT SALTER KNOWINGLY, INTENTIONALLY OR WITH RECKLESS DISREGARD FOR THE TRUTH, MADE FALSE STATEMENTS IN THE PETITION TO COMMIT.

A. Petitioner cannot present any factual dispute on the issue of Respondent Salter's knowledege at the time he executed the Petition to Commit.

Petitioner has raised several factual points in an attempt to show that Respondent Salter intentionally or recklessly put

false information in the Petition to Commit. Petitioner attempts to show that the allegations in the Petition, when compared with the actual testimony at the final commitment hearing, were false. This issue was addressed by the District Court which found that the "slight discrepancies" between the allegations in the Petition to Commit and the testimony at the commitment hearing "simply do not create a genuine issue concerning Salter's knowledge prior to and at the time he executed the Petition to Commit." (B.52-53).

Petitioner also points out that the Respondents never contacted him prior to the execution and filing of the Petition to Commit. Petitioner implies that this fact shows some malicious intent or improper motive on the part of Respondent Salter. However, this issue too was addressed by the District Court which found that Respondents had investigated alternatives and consulted with those who had unsuccessfully confronted the petitioner. (B.13). Where, as in the present case, a petition to commit seeks to have a person placed in custody prior to the final hearing on the merits, that person has no due process right to any advance notice prior to being brought before the probate judge, as any such notice requirement would defeat the purpose of the statute. Pope v. Alston, 537 So.2d 953, 955 (Ala. Civ. App. 1988). Therefore, contrary to petitioner's contention on page 22 of his brief, the Respondents were not required to consult with the petitioner Bush before filing the Petition to Commit.

The two points discussed above, along with his own conclusory denials, encompass all of petitioner's "disputed facts" which he argues made summary judgment improper in this case. As discussed above, petitioner conceded in his deposition that Salter did not intentionally or recklessly include false statements in the Petition to Commit. (B.51). Petitioner's attempt, on page 33 of his brief, to dispute the issue or Respondent Salter's knowledge at the time he executed the Petition to Commit with vague inferences and conclusions drawn from the above-discussed facts is, as found

by the District Court, wholly inadequate.

B. Petitioner's challenge to the substance of the Petition to Commit and the veracity thereof is insufficient.

Petitioner alleges on pages 16 through 17 of his brief that the Petition to Commit "contained false statements that were either knowingly or intentionally made by Billy Salter, or the false statements were made with a reckless disregard for the truth." This is the first of petitioner's insurmountable evidentiary hurdles, as enumerated in Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The District Court found that the petitioner's fourth amendment claim hinged upon the issue of Respondent Salter's knowledge prior to and at the time he executed the Petition to Commit; specifically, whether Respondent Salter "knew or had reason to know that the information he included in the Petition was false, and . . . [whether any such] lack of knowledge . . . result[ed] from a deliberate, knowing or reckless disregard of facts available or reasonably available to him." (B.48-49). Petitioner must prove that the Respondent Salter knowingly and intentionally, or with reckless disregard, included materially false statements in the Petition to Commit, which false statements were necessary to the Probate Judge's decision to issue the Writ for Body. Rugendorf v. United States, 376 U.S. 528, 84 S. Ct. 1330, 11 L. Ed. 2d 887 (1964), Franks, 438 U.S. at 163-64, 98 S. Ct. at __, 57 L. Ed. 2d at 677. Despite his allegations regarding Respondent Salter's knowledge at the time he executed the Petition to Commit, petitioner concedes in his deposition that Salter did not intentionally or recklessly include false statements in the Petition to Commit. (B.51).

C. Respondents have presented substantial evidence that the warrant was signed and issued by a judicial officer and the Respondent Salter neither knew nor had reason to know that information included in the petition was false and, that his lack of knowledge was not the result of a deliberate, knowing or reckless disregard of facts available or reasonably available

to him.

"In a Section 1983 suit attacking the veracity of a warrant, the defendants have met their Rule 56 burden on a Motion for Summary Judgment by submitting evidence that the warrant was signed and issued by a judicial officer." Willocks v. Dodenhoff, 110 F.R.D. 652, 657 (D. Conn. 1986). Accord Franks, 438 U.S. at 171, 57 L.Ed. 2d at 682. In the present case, the Writ for Body whereby petitioner was arrested was issued by the Probate Judge of Mobile County. (B.16). Respondents assert that the burden should therefore shift to the petitioner to set forth specific facts showing that there is a genuine issue for trial. Id. However, the District Court ruled that the holding in Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991), requires the Respondents to present sufficient evidence to establish that Respondent Salter neither knew nor had reason to know that information included in the Petition was false and, that his lack of knowledge was not the result of a deliberate, knowing or reckless disregard of facts available or reasonably available to him. (B.48-50). In the present situation, the District Court found that Respondent Salter, in executing the Petition to Commit, acted much like a law enforcement officer who executes a warrant based upon information received from others, which warrant is later used by an appropriate judicial officer as the basis for issuing an arrest warrant. (B.48). Petitioner bears the additional burden of proving that Respondent Salter knew or had reason to know that the information provided to him by his advisors was false. Rugendorf, 376 U.S. at 532-33, 84 S. Ct. at __, 11 L. Ed. 2d at __.

The District Court found that the Respondents adduced substantial evidence that Respondent Salter acted solely based upon information, believed by him to be true, obtained from several other individuals whom he believed to be reliable and credible. (B.50). The District Court found no evidence to suggest that Respondent Salter received any mitigating information about the petitioner and disregarded such. (B.50-51).

The District Court found that this evidence satisfied the Respondents' burden under Clark. (B.52). The District Court further found that the petitioner "has adduced no evidence, other than his own blanket denials and the commitment hearing transcript, to try to establish that there is a genuine issue of material fact regarding Respondent Salter's knowledge (or culpable lack thereof), at the time he executed the Petition to Commit, of the veracity of the statements included in the Petition." (B.53).

D. Differences between the allegations in the Petition to Commit and the actual testimony at the final commitment hearing are relevant only to the issue of Respondent Salter's knowledge at the time he executed the Petition to Commit and are not sufficient to create a factual question regarding that issue.

Petitioner emphasizes differences between the allegations in the Petition to Commit and the actual testimony at the final commitment hearing. (Pet. Brief, pp 17-21). These alleged differences are relevant only to the issue of whether Respondent Salter intentionally or recklessly included false information in the Petition. Petitioner refers to "Salter's blatant inaccurate statements to the Probate Judge" but is unable to direct this Court to any facts showing such alleged inaccuracies. (Pet. Brief, p. 32). The following contrast of the contents of the Petition to Commit with the actual testimony from the witnesses highlights what petitioner characterizes as the "false statements", "untrue" statements and "blatant inaccurate statements" in the Petition to Commit:

1) The Petition to Commit contained information received from Alphonse Gordon that Mr. Bush had threatened to hire a hit man for $500.00 to have two school officials, Paul Sousa and Joe Smith, killed. Mr. Gordon's actual testimony at the final commitment hearing disclosed that petitioner Bush had complained that the two school officials, Sousa and Smith, were mistreating him and were out to get him. (B.18-19). Petitioner also told Mr. Gordon that Sousa and Smith were

trying to take his job and that people were following him. (R.61-7-8). Mr. Gordon testified that petitioner said he had guns and would not let them hurt him. (R.61-8). Mr. Gordon testified that petitioner said there's a possibility he could get people eliminated that kept bothering him, for $500.00 (B.19). Petitioner's discussion and comments were made with regard to the two school officials, Sousa and Smith. (B.18-19). Mr. Gordon testified that he had gone to school officials and told them about petitioner Bush's comments and behaviour because he "wanted them to know, if this continued, there's a possibility that being uptite anything could happen." (R.61-16). Mr. Gordon's testimony at the hearing confirmed the facts alleged in the Petition to Commit.

2) The Petition to Commit contains information from Juliette Stroman that petitioner had phoned OCR and was going to kill people in the central office. Ms. Stroman's actual testimony at the final commitment hearing was that petitioner Bush called in March of 1988, after receiving OCR's letter informing him that OCR had no jurisdiction to investigate charges he had brought against the district and said they were still out to get him. (R.61-28). Ms. Stroman testified that petitioner went on to say that "they were out there, out to get him, they're harrassing me, they've been following me, and how could you all say you could do nothing? How could you do nothing about this." (R.61-28-29). Ms. Stroman further testified that petitioner "went on . . . just sort of monotone . . . he (petitioner) said, well I guess you are just forcing me to take matters into my own hands. I guess I'll have to get a gun and blow some brains out." (B.19-20). Ms. Stroman's testimony at the hearing confirmed all the facts alleged in the Petition to Commit.

3) The Petition to Commit contained information from Sgt. Ross Rovers that the petitioner had accused Rovers of allowing students to vandalize his car and that petitioner had steered his car toward Rovers and come within a few inches of hitting him. Testimony from Sgt. Rovers at the final commitment hearing established that petitioner Bush entered a parking lot at school where Sgt. Rovers was standing and "veered his car toward [Rovers] so that he had to jump out of

the way." (B.20, R.61-38). Sgt. Rovers testified that, had he not jumped out of the way, the petitioner would have hit him. (R.61-39). Sgt. Rovers also testified that the petitioner accused him of allowing students to vandalize petitioner's car. (R.61-49). Sgt. Rovers' testimony at the hearing confirmed all the facts alleged in the Petition to Commit.

4) The Petition to Commit contained information from Bob Ensley that petitioner had made a series of phone calls, weeping and had threatened to kill the two school officials, Sousa and Smith and that Sousa was having him followed by UPS and Wells Fargo Trucks. Mr. Ensley testified at deposition that petitioner had indicated he was under surveillance by UPS and Wells Fargo and that petitioner constantly blamed Paul Sousa. (B.8-9). According to Mr. Ensley, petitioner accused Mr. Sousa of being a dangerous man and of throwing poisonous snakes into petitioner's yard. (R.56-16). Mr. Ensley also testified that petitioner called and "became hysterical on the telephone saying that if his children were injured . . . he was going to get a gun and go kill Mr. Sousa." (B.9, R.56-16). Mr. Ensly testified that he received 15 to 20 such calls from the petitioner. (R.56-17). Mr. Ensley also testified that the petitioner "would start crying uncontrollably." (R.56-32). Mr. Ensley testified that the contents of the Petition were substantially correct. (R.56-34). Mr. Ensley's testimony at the hearing confirmed all the facts alleged in the Petition to Commit.

Petitioner, based upon the above outlined variations, concludes that ". . . a jury could reasonably draw an inference from the facts that Billy Salter knowingly and intentionally, or with reckless disregard for the truth, included false statements in the commitment petition affidavit . . ." (Pet. Brief, p. 33). The District Court found that the petitioner "has adduced no evidence, other than his own blanket denials and the commitment hearing transcript, to try to establish that there is a genuine issue of material fact regarding Respondent Salter's knowledge (or culpable lack thereof), at the time he executed the Petition to Commit, of the veracity of the statements

included in the Petition." (B.52). With regard to the above outlined variations, the District Court found that the "slight discrepancies" between the allegations in the Petition to Commit and the testimony at the final commitment hearing "simply do not create a genuine issue concerning Salter's knowledge prior to and at the time he executed the Petition to Commit." (B.52).

E. Petitioner's claim that the Petition to Commit contains incorrect statements is insufficient to challenge the validity of the warrant.

Petitioner, on pages 16 through 21 and pages 24 and 28 of his brief emphasizes slight differences between the facts contained in the Petition and those actually borne out by testimony of the witnesses at the final commitment hearing, and attempts to challenge the contents of the Petition to Commit, claiming that evidence contained in the Petition was insufficient or untrue and that Respondent Salter should have known that it was insufficient or untrue. There is a presumption of validity with respect to the evidence supporting the Petition to Commit. Franks, 438 U.S. at 171, 98 S. Ct. at _, 57 L. Ed. 2d at 682, Willocks, 110 F.R.D. at 657. The facts contained in the Petition are to be viewed with common-sense in order to determine whether there is probable cause. Franks, 438 U.S. at 164-65, 98 S. Ct. at _, 57 L. Ed. 2d at 677-78, Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), Willocks, 110 F.R.D. at 658-59. The facts as alleged in the Petition to Commit provided probable cause for the issuance of the Writ for Body by the Probate Judge and are truthful such that they do not violate the Fourth Amendment. See Franks, 438 U.S. at 164-65, 98 S. Ct. at _, 57 L. Ed. 2d at 677-78, Willocks, 110 F.R.D. at 658-59. Petitioner claims that Respondent Salter breached some undefined duty to the petitioner by relying upon hearsay in filing the Petition to Commit. No such duty exists and petitioner's position is unsupported by law or fact.

> When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing. This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be gathered hastily.

Willocks, 110 F.R.D. at 658, quoting Franks, 438 U.S. at 164-65, 98 S. Ct. at , 57 L. Ed. 2d at 677-78.
Petitioner concedes in his deposition that Respondent Salter did not intentionally or recklessly include false statements in the Petition to Commit. (R.56-85-88, 94-95). The evidence before this Court shows that the statements were in fact "true" as defined in Franks.

Petitioner has failed to address the issue upon which the District Court relied in granting summary judgment Salter's knowledge at the time he executed the Petition. There is no evidence before this Court to support a finding in petitioner's favor with regard to the issue of Respondent Salter's knowledge at the time he executed the Petition to Commit. The undisputed evidence shows that the Petition to Commit was executed in good faith and was based upon information which the evidence has shown to be true.

II.

THE ISSUE OF PROBABLE CAUSE IS A QUESTION OF LAW AND IS NOT RELEVANT TO A DETERMINATION OF THE CORRECTNESS OF SUMMARY JUDGMENT

A. Petitioner was arrested and detained pursuant to the Alabama Statutes governing Commitment of Persons [§22-

52-1 et seq. Code of Alabama (1975)].

Petitioner claims that a genuine issue of fact exists regarding probable cause for his arrest. This is a legal question governed by §22-52-1 et seq. of the Code of Alabama (1975). The specific action by the Respondents, upon which petitioner bases his claims, is Respondent Salter's execution of the Petition to Commit, in which Salter alleged that petitioner posed a present threat of substantial harm to himself or others. Such petitions and the process for filing them are provided for under §22-52-1 Code of Alabama (1975). The petition, as required by §22-52-1, was executed under oath, filed with the Probate Judge of Mobile County and contained the name and address of the petitioner, his location, and the date and place of four separate incidents, including the names of witnesses to each incident, which indicated that he had threatened substantial harm to others. A probate judge is required by §22-52-2, to review such petitions before any action is taken pursuant thereto. The Petition requested that limitations be placed upon the petitioner's liberty pending the outcome of the final hearing on the Petition, as provided in §22-52-7. The Probate Judge, acting in accordance with §22-52-1 and 22-52-2, decided that the Petition was meritorious and, pursuant to §22-52-7, ordered the Mobile County Sheriff to serve a copy of the Petition on the petitioner Bush and bring him before the Probate Judge immediately. (B.16). Pursuant to §22-52-7, petitioner Bush was brought before the Probate Judge of Mobile County immediately after his arrest. (B.16). Only after the required interview with the Probate Judge was petitioner Bush taken to the USA Medical Center and held there. (B.16-17).

B. The Probate Judge of Mobile County found that the Petition to Commit did show probable cause to issue the Writ for Body, whereby the petitioner was arrested.

The Respondents did not and could not decide the issue of probable cause with regard to the Petition to Commit. This

issue was properly decided by the Probate Judge of Mobile County, pursuant to §22-52-2, Code of Alabama (1975), who found that the petition was supported by probable cause. Petitioner's contentions, on pages 33 and 34 of his brief, that the evidence in the Petition to Commit was inaccurate and untrue are without merit. Illinois v. Gates, 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 544 (1983) (In dealing with probable cause, . . . as the very name implies, we deal with probabilities), quoting Brinegar v. United States, 338 U.S. 160, _ S. Ct. _, 93 L. Ed. 1879 (1949), United States v. Ventresca, 380 U.S. 102, 107, 85 S. Ct. 741, 13 L. Ed. 2d 684, 688 (1965) (the term probable cause means less than evidence which would justify condemnation . . . and may rest upon evidence which is not legally competent [at] trial), Rugendorf v. United States, 376 U.S. 528, 533, 84 S. Ct. 825, 11 L. Ed. 2d 887, 891 (1964) (hearsay may be the basis for a warrant) quoting Jones v. United States, 362 U.S. 257, _ S. Ct. _, 4 L. Ed. 2d 697, 708 (1960).

Respondent Salter's only action was the filing of the Petition to Commit. No other conduct by the Respondents has been alleged by the petitioner. Quite simply, the Respondents did not arrest or detain the petitioner, nor did they order his arrest or detention. The Respondents, in accordance §22-52-1 of the Code of Alabama, requested that the Probate Judge of Mobile County review the circumstances and, if he deemed it appropriate, take action with regard to the petitioner. See Lynch v. Baxley, 744 F. 2d 1452, 1460 (11th Cir. 1984) (Probate Judge has jurisdiction the moment the petition to commit an individual is filed and the individual is taken into custody). The Alabama statutes governing involuntary commitment meet the due process requirements of the Fourth Amendment. See Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), Lynch, 744 F. 2d at 1460, Pope v. Alston, 537 So. 2d 953 (Ala. Civ. App. 1988). Where, as in the present case, a petition to commit seeks to have a person placed in custody prior to the final hearing on

the merits, that person has no due process right to any advance notice prior to being brought before the probate judge, as any such notice requirement would defeat the purpose of the statute. Pope, 537 So. 2d at 955. The Respondents fully complied with the Alabama statutory procedure for involuntary commitment.

C. Differences between the allegations in the Petition to Commit and the actual testimony at the final commitment hearing are relevant only to the issue of Respondent Salter's knowledge at the time he executed the Petition to Commit.

Petitioner emphasizes differences between the allegations in the Petition to Commit and the actual testimony at the final commitment hearing. (Pet. Brief, pp. 17-21). As discussed above, these differences are relevant only to the issue of whether Respondent Salter intentionally or recklessly included false information in the Petition.

D. Petitioner ignores the distinction between the standard of proof required for temporary commitment pending the final hearing and the standard required for commitment at the final hearing.

Petitioner attempts to raise the issue of whether probable cause existed for issuance of the Writ for Body. In doing so, plaintiff confuses the burdens of proof imposed during the process for involuntary commitment and has misstated the law governing execution of a Petition to Commit and issuance of a Writ for Body. Petitioner refers to §22-55-10 (which is actually §22-52-10) in support of his contention that Respondent Salter should have known the evidence was insufficient to have the petitioner committed. This section defines the standard by which a probate judge, "at the final hearing upon a petition to commit a person" may order an individual confined in a state mental health facility. §22-52-10 Code of Alabama (1975). Petitioner fails to acknowledge the distinction between:

1) the standard of proof required at the final hearing under §22-52-10; and
2) the process under §22-52-1 for filing the initial petition, wherein no mention of probable cause is made. See United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684, 688 (1965).

Contrary to petitioner's argument, §22-52-2 and 22-52-7 do not call for the "clearly, unequivocally and convincingly" standard contained in §22-52-10 and impose no requirement of a dangerous act.

E. Respondents had no duty to evaluate the evidence contained in the Petition to Commit.

Petitioner is mistakenly attempting to impose a duty upon Respondent Salter whereby he was to have known at the time the Petition to Commit was signed that the statements contained in the Petition were insufficient for commitment of the petitioner. This duty simply does not exist and would be the equivalent of requiring a police officer to know that a suspect would in fact be convicted before obtaining a warrant for his arrest. See Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), United States v. Ventresca, 38 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). The decision regarding probable cause in the present situation is delegated by statute to the Probate Judge, who did make such a decision regarding the petitioner both at the time the Petition to Commit was reviewed and when the petitioner was brought before him immediately after the arrest. §22-52-7 Code of Alabama (1975), Pope, 537 So. 2d at 955.

F. There was probable cause for the Writ for Body, pursuant to which, petitioner was arrested.

The issue of probable cause is not relevant to a determination of any liability on the part of the Respondents. However, should this Court decide that such a determination is necessary, the relevant "facts" discussed in petitioner's brief

as part of his probable cause argument are undisputed and are as follows:

- Prior to filing the Petition to Commit, Salter discussed the situation with the District Attorney.
- No arrest warrant or criminal complaint resulted.
- Salter did not tell the Probate Judge about the meeting with the District Attorney.

From these "facts", petitioner concludes that there was a lack of probable cause for issuance for the Writ for Body pursuant to which he was arrested. (Pet. Brief, pp. 24-25). The "facts" relied upon by the petitioner have no bearing on the issue of probable cause. The issue of probable cause for petitioner's arrest was properly decided by the Probate Judge. (B.16-17).

III

THE BOARD OF SCHOOL COMMISSIONERS IS NOT SUBJECT TO LIABILITY UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

Petitioner is mistaken in his contention that the Board of School Commissioners of Mobile County is liable under the doctrine of respondeat superior.

The theory of respondeat superior is insufficient to impose Section 1983 liability on a school board. Arnold v. Board of Education of Escambia County Alabama, 880 F. 2d 305 (11th Cir. 1989). There is no evidence that the Petition to Commit was executed or that petitioner was arrested pursuant to an official policy of The Board of School Commisioners of Mobile County. Therefore, the Board is not liable under the doctrine of respondeat superior. Id.

CONCLUSION

For the aforesaid reasons, the Writ should not be granted because: (1) Petitioner has presented no evidence creating an issue of material fact regarding Respondent Salter's knowledge or intent at the time he executed the Petition to Commit; (2) the issue of probable cause for petitioner's arrest is a question of law and was properly decided by the Probate Judge; and (3) the Board of School Commisioners of Mobile County may not be held liable under the doctrine of respondeat superior.

Respecfully submitted this _____ day of _____ . 1993

SINTZ, CAMPBELL, DUKE AND TAYLOR
Attorney for Defendants

BY: Robert C. Campbell III
ROBERT C. CAMPBELL, III

BY: _____
WILLIAM F. PIPKIN, JR.
3763 Professional Parkway
Mobile, AL 36609
(205) 344-7241